

AMENDED IN ASSEMBLY MAY 6, 1999

CALIFORNIA LEGISLATURE—1999–2000 REGULAR SESSION

**ASSEMBLY BILL**

**No. 540**

**Introduced by Assembly Member Machado**

February 18, 1999

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An act to amend Section 411.35 of the Code of Civil Procedure, relating to malpractice actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 540, as amended, Machado. Malpractice actions: architects, engineers, or surveyors.

Existing law requires the attorney for the plaintiff or cross-complainant in any action arising out of the professional negligence of an architect, professional engineer, or land surveyor to file a certificate declaring either that the attorney has consulted and received an opinion from an architect, professional engineer, or land surveyor, licensed to practice in this state or in any other state, or that the attorney was unable to obtain that consultation for specified reasons. ~~Existing law does not, except in specified circumstances, require the attorney to disclose the name of the expert consulted or who refused the consultation and requires only one certificate be filed, even if multiple defendants have been named.~~

This bill would require the certificate to be served in addition to being filed; ~~would specify that the expert giving the consultation shall be licensed by this state or a state that has reciprocity for California licensed architects, professional~~

~~engineers, or land surveyors; and would require that the expert giving the consultation, or refusing to give a consultation, be named in the certificate. The bill would specify that one certificate shall be filed and served for each practice discipline, as defined, of the defendant or multiple defendants.~~

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 411.35 of the Code of Civil  
2 Procedure is amended to read:

3 411.35. (a) In every action, including a  
4 cross-complaint for damages or indemnity, arising out of  
5 the professional negligence of a person holding a valid  
6 architect's certificate issued pursuant to Chapter 3  
7 (commencing with Section 5500) of Division 3 of the  
8 Business and Professions Code, or of a person holding a  
9 valid registration as a professional engineer issued  
10 pursuant to Chapter 7 (commencing with Section 6700)  
11 of Division 3 of the Business and Professions Code, or a  
12 person holding a valid land surveyor's license issued  
13 pursuant to Chapter 15 (commencing with Section 8700)  
14 of Division 3 of the Business and Professions Code on or  
15 before the date of service of the complaint or  
16 cross-complaint on any defendant or cross-defendant, the  
17 attorney for the plaintiff or cross-complainant shall file  
18 and serve the certificate specified by subdivision (b).

19 (b) A certificate shall be executed by the attorney for  
20 the plaintiff or cross-complainant declaring one of the  
21 following:

22 (1) That the attorney has reviewed the facts of the  
23 case, that the attorney has consulted with and received an  
24 opinion from at least one architect, professional engineer,  
25 or land surveyor who is licensed to practice and practices  
26 in this state or any other state ~~that has reciprocity for~~  
27 ~~California licensed architects, professional engineers, or~~  
28 ~~land surveyors, or who teaches at an accredited college~~  
29 *or university and is licensed to practice in this state or any*

1 *other state*, in the same discipline as the defendant or  
2 cross-defendant and who the attorney reasonably  
3 believes is knowledgeable in the relevant issues involved  
4 in the particular action, and that the attorney has  
5 concluded on the basis of this review and consultation  
6 that there is reasonable and meritorious cause for the  
7 filing of this action. The person consulted may not be a  
8 party to the litigation ~~and shall be named in the~~  
9 ~~certificate~~. The person consulted shall render his or her  
10 opinion that the named defendant or cross-defendant was  
11 negligent or was not negligent in the performance of the  
12 applicable professional services.

13 (2) That the attorney was unable to obtain the  
14 consultation required by paragraph (1) because a statute  
15 of limitations would impair the action and that the  
16 certificate required by paragraph (1) could not be  
17 obtained before the impairment of the action. If a  
18 certificate is executed pursuant to this paragraph, the  
19 certificate required by paragraph (1) shall be filed within  
20 60 days after filing the complaint.

21 (3) That the attorney was unable to obtain the  
22 consultation required by paragraph (1) because the  
23 attorney had made three separate good faith attempts  
24 with three separate architects, professional engineers, or  
25 land surveyors to obtain this consultation and none of  
26 those contacted would agree to the consultation.  
27 ~~However, a certificate filed pursuant to this paragraph~~  
28 ~~shall disclose the names of the architects, professional~~  
29 ~~engineers, or land surveyors refusing the consultation.~~

30 (c) Where a certificate is required pursuant to this  
31 section, ~~one certificate shall be filed and served based~~  
32 ~~upon an opinion from a design professional in the same~~  
33 ~~practice discipline as each defendant or cross-defendant.~~  
34 ~~One certificate shall be filed and served for each practice~~  
35 ~~discipline, notwithstanding that multiple defendants or~~  
36 ~~cross-defendants in the same practice discipline have~~  
37 ~~been named in the complaint or may be named at a later~~  
38 ~~time. For the purposes of this subdivision, the term~~  
39 ~~“practice discipline” means an architect, a structural~~  
40 ~~engineer, a mechanical engineer, an electrical engineer,~~

~~1 a civil engineer, or land surveyor, as defined in the~~  
~~2 licensing provisions of the Business and Professions Code.~~  
~~3 section, only one certificate shall be filed,~~  
~~4 notwithstanding that multiple defendants have been~~  
~~5 named in the complaint or may be named at a later time.~~

(d) Where the attorney intends to rely solely on the doctrine of “res ipsa loquitur,” as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of “res ipsa loquitur” or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the *identity of the architect, professional engineer, or land surveyor consulted and the contents of the consultation.* The privilege shall also be held by the architect, professional engineer, or land surveyor so consulted. *If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the architect, professional engineer, or land surveyor, the court may require the attorney to divulge the names of architects, professional engineers, or land surveyors refusing the consultation.*

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

1 (h) Upon the favorable conclusion of the litigation  
2 with respect to any party for whom a certificate of merit  
3 was filed or for whom a certificate of merit should have  
4 been filed pursuant to this section, the trial court may,  
5 upon the motion of a party or upon the court's own  
6 motion, verify compliance with this section, by requiring  
7 the attorney for the plaintiff or cross-complainant who  
8 was required by subdivision (b) to execute the certificate  
9 to reveal the ~~address~~ *name*, *address*, and telephone  
10 number of the person or persons consulted with pursuant  
11 to subdivision (b) that were relied upon by the attorney  
12 in preparation of the certificate of merit. The ~~address~~  
13 *name*, *address*, and telephone number shall be disclosed  
14 to the trial judge in an in-camera proceeding at which the  
15 moving party shall not be present. If the trial judge finds  
16 there has been a failure to comply with this section, the  
17 court may order a party, a party's attorney, or both, to pay  
18 any reasonable expenses, including attorney's fees,  
19 incurred by another party as a result of the failure to  
20 comply with this section.

21 (i) For purposes of this section, "action" includes a  
22 complaint or cross-complaint for equitable indemnity  
23 arising out of the rendition of professional services  
24 whether or not the complaint or cross-complaint  
25 specifically asserts or utilizes the terms "professional  
26 negligence" or "negligence."